Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–716 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
7 MARCH 2002

Public Authorities *— Statutory body — Powers of — Entry into private land for installation and construction of pylons — Notice of intention to enter land by public authorities, whether within public law environment — Whether judicial review available — Whether statutory appellate procedure must be exhausted first before applying for judicial review — Electricity Supply Act 1990 ss 2, 11, (1), (2), (4) & (6) — Rules of the High Court 1980 O 53 — Land Acquisition Act 1960*

Words and Phrases *— 'such posts or other equipment' — Electricity Supply Act 1990 ss 2 & 11*

The appellant, Tenaga Nasional Bhd had issued a notice under s 11 of the Electricity Supply Act 1990 ('the Act') to the respondent landowner whose land was required for purposes of constructing pylons carrying high tension wires. In accordance with s 11(4) of the Act, the respondent lodged its objections to the notice. The land administrator then issued a notice to conduct an enquiry. No inquiry was held because the respondent had applied to the High Court for judicial review to quash the s 11 notice. The learned judge quashed the s 11 notice (see [2002] 1 MLJ 113), on the grounds that: (i) the notice was illegal because the construction of pylons (and not mere posts) did not fall within the purpose of s 11 of the Act; and (ii) the availability of appeal under the Act did not preclude the court from granting judicial review. The appellant appealed.

Held, allowing the appeal:

(1) The relevant words in s 11(1) of the Act that 'such posts and other equipment as may be necessary or proper for the purposes of the licensed installation' did not confine the appellant as licensee under the Act to merely constructing posts. The expression 'such purposes as transmission' in the definition of the word 'equipment' in s 2 of the Act must a fortiori included pylons designed to carry electrical power from one point to another. It followed therefore that the s 11 notice in the present case was not tainted with any illegality (see pp 713G–H, 714D–E).

(2) Since the activity complained of fell within the public law environment, it followed that the appellant was not exempted from judicial review. The proper time at which this should be done was after the exhaustion of the statutory appellate procedure. Thus, issues such as the inappropriateness of the compensation element and the inapplicability of the Act to the case where land had to be set aside were more appropriate for the hearing before the land

administrator under s 11(6) of the Act. Therefore the learned judge was wrong in issuing judicial review against the appellant and in quashing the s 11 notice (see pp 715A–B, F, 716B, E).

(3) The respondent's fear that it would not obtain fair and reasonable compensation under the Act as compared to the Land Acquisition Act 1960 were more imagined than real. Section 11(1) of the Act made it abundantly clear that 'full compensation in accordance with s 16' was to be paid 'to all persons interested for any disturbance, damage or disability' suffered by them. These words would, in appropriate circumstances, such as the present case, encompassed the deprivation or loss of use of land in consequence of the erection of pylons (see p 715G–I).

[**Bahasa Malaysia summary**

Perayu, Tenaga Nasional Bhd telah mengeluarkan satu notis di bawah s 11 Akta Bekalan Elektrik 1990 ('Akta tersebut') kepada pemilik tanah tersebut, iaitu responden, di mana tanah tersebut dihendaki bagi tujuan menaikkan pilon-pilon yang menampung wayar-wayar 'high tension'. Menurut s 11(4) Akta tersebut, responden telah membuat bantahan terhadap notis tersebut. Pentadbir tanah kemudiannya telah mengeluarkan satu notis untuk satu siasatan dijalankan. Tidak siasatan telah dijalankan kerana responden telah memohon ke Mahkamah Tinggi untuk kajian semula bagi membatalkan notis s 11 tersebut (lihat [2002] 1 MLJ 113), atas alasan bahawa: (i) notis tesebut menyalahi undang-undang kerana pembinaan pilon-pilon tersebut (dan bukan hanya tiang-tiang) tidak terlingkung dalam maksud s 11 Akta tersebut; dan (ii) kewujudan rayuan di bawah Akta tersebut tidak menghalang mahkamah daripada membenarkan kajian semula tersebut. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Perkataan-perkataan yang relevan dalam s 11(1) Akta tersebut bahawa 'such posts and other equipment as may be necessary or proper for the purposes of the licensed installation' tidak membataskan perayu sebagai seorang pemegang lesen di bawah Akta tersebut untuk hanya membina tiang-tiang. Ungkapan 'such purposes as transmission' dalam tafsiran perkataan 'equipment' dalam s 2 Akta tersebut mesti termasuk pilon-pilon yang direka untuk menyalur kuasa elektrik dari satu tempat ke satu tempat yang lain. Oleh demikian notis s 11 dalam kes ini tidak tercemar oleh apa-apa kepenyalahan undang-undang (lihat ms 713G–H, 714D–E).

(2) Memandangkan aktiviti yang diadukan terlingkung di bawah bidang undang-undang awam, ini bermaksud perayu tidak dikecualikan daripada kajian semula. Masa yang tepat ini sepatutnya dilakukan adalah selepas selesai prosedur rayuan

statutori. Oleh itu, persoalan-persoalan seperti ketidaksesuaian elemen pampasan dan ketidakterapan Akta tersebut kepada kes di mana tanah tersebut perlu diketepikan adalah lebih sesuai untuk didengar di hadapan pentadbir tanah di bawah s 11(6) Akta tersebut. Oleh itu, hakim yang arif telah terkhilaf dalam membenarkan kajian semula terhadap perayu dan dalam pembatalan notis s 11 (lihat ms 715A–B, F, 716B, E).

(3) Kebimbangan responden bahawa ia tidak akan memperoleh satu pampasan yang adil dan munasabah di bawah Akta tersebut jika dibandingkan dengan Akta Pengambilan Tanah 1960 lebih merupakan imaginasi daripada yang sebenarnya. Seksyen 11(1) Akta tersebut memperuntukkan dengan jelas bahawa 'full compensation in accordance with s 16' hendaklah dibayar 'to all persons interested for any disturbance, damage or disability' yang dialami oleh mereka. Perkataan-perkataan berikut akan, dalam keadaan yang sesuai, seperti dalam kes ini, merangkumi kilanan atau kehilangan penggunaan tanah akibat daripada penegakan pilon-pilon tersebut (lihat ms 715G–I).]

Notes

For a case on the powers of a statutory body, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) para 1586.

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (refd)
DP Vijandran v Majlis Peguam [1995] 3 MLJ 576 (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1 (refd)
OSK & Partners Sdn v Tengku Noone Aziz & Anor [1983] 1 MLJ 179 (refd)
Pepper (Inspector of Taxes) v Hart [1993] AC 593 (refd)
Taylor & Anor v North West Water (1995) 70 P & CR 94 (refd)
Tekali Prospecting Sdn Bhd v Tenaga Nasional & Anor [2002] 1 MLJ 113 (refd)

Legislation referred to

Electricity Supply Act 1990 ss 2, 10, 11(1), (2), (4), (6), (7), 16
Land Acquisition Act 1960
Public Health Act 1936 s 15
Rules of the High Court 1980 O 53 r 2(4)

Appeal from: Application for Judiciary Revision No R2–25–19 of 2001 (High Court, Kuala Lumpur)

SH Amirudin (*Zul Rafique & Partners*) for the appellant. A
A Kanesalingam (*Kanesalingam & Co*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): The appellant, Tenaga Nasional Bhd, is a public company limited by shares. Its principal business is to generate and supply electricity to the far flung reaches of Semenanjung Malaysia. To effect this supply there needs to be a B national grid. One is already in existence. The appellant intended to construct a second grid. It is common knowledge that such a grid became necessary in view of the increase in demand for electricity, especially along the West Coast of Semenanjung Malaysia.

In order to construct the grid, the appellant had to put up pylons C carrying high tension wires to be used to convey electrical power. For that purpose the appellant issued a notice under s 11 of the Electricity Supply Act 1990 ('the Act'). It may be added in parenthesis that the appellant is a licensee under the Act and that its relationship with members of the public is subject to control by the authorities referred to in the Act, principally the director general and the minister. The s 11 notice is dated 23 December D 2000. It is addressed to the respondent. Under s 11 of the Act, once a notice of the sort we have just referred to is served on a landowner, certain consequential procedural steps are immediately triggered. This is apparent from the language of the Act in s 11, which reads as follows:

(1) Subject to as hereinafter provided, whenever it is necessary so to do for E the purpose of installing any system of distribution of energy under this Act, a licensee may lay, place or carry on under or over any land, other than state land, such posts and other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient, paying full compensation in accordance F with s 16 to all persons interested for any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment.

(2) Before entering on any land for the purpose specified in sub-s (1), the licensee shall give a notice stating as fully and accurately as possible the G nature and extent of the acts intended to be done. The notice shall be substantially in the form set out in the First Schedule and the district land administrator shall specify a date upon which the state authority shall inquire into any objection that may have been made as hereinafter provided.

(3) The aforesaid notice shall be given H

(a) in the case of alienated land, to the owner or occupier;

(b) in the case of reserved land, to the officer or any other person in charge of the reserved land or, in the absence of any such officer or person, to the district land administrator,

and may be sent by registered post or be left at the usual or last known I place of abode of the person to whom it is to be given or served by the licensee or the district land administrator at the expense of the licensee, either in the manner hereinbefore provided or in the manner provided for

A the service of notices by any written law relating to land in force in the state where the land is situated.

(4) Any of the persons mentioned in sub-s (3) may, within fourteen days of the receipt of the notice therein referred to, lodge an objection to the intended acts of the licensee. The objection may be made to the district land administrator, either verbally or in writing, and the district land B administrator shall give notice of the objection to the state authority and to the licensee.

(5) If no objection is lodged within the time limited for that purpose by sub-s (4), the licensee may forthwith enter on the land and do all or any of the acts specified in the notice given under sub-s (2).

C (6) If an objection is lodged and is not withdrawn before the date fixed for the hearing thereof, the district land administrator shall hold an enquiry, giving all parties an opportunity to be heard.

(7) Upon the conclusion of the enquiry the district land administrator may either unconditionally or subject to such terms, conditions and stipulations as he thinks fit, make an order authorizing or prohibiting any of the acts mentioned in the notice given under sub-s (2). The order shall D be substantially in the form set out in the Second Schedule:

Provided that any party who is dissatisfied with the district land administrator's order may within twenty-one days after the order appeal against such an order to the state authority which may then uphold, set aside or vary the order upon such terms, conditions and stipulations as it thinks fit. E

(8) The state authority may, if it thinks fit, in lieu of making an order under sub-s (7), direct the acquisition of any land or part of any land included in a notice given under sub-s (2).

(9) The decision of the state authority under this section shall be final.

F (10) Notwithstanding any written law relating to land matters, the registrar:

(a) upon the production to him of the notice issued by the licensee under sub-s (2) together with the statement by the district land administrator that no objection had been lodged by any of the persons mentioned in sub-s (3); or

(b) upon the production to him of the original order made under G sub-s (7) and upon the deposit with him of a certified copy of such order,

shall cause to be made on the register document of title relating to the land affected by the notice or order as the case may be, a note of the existence of the rights under such notice or order.

H So, in accordance with s 11(4) of the Act, the respondent had 14 days within which to lodge its objections to the notice issued by the appellant under s 11(2) of the Act. An objection was lodged. The land administrator, then, in accordance with s 11(6) of the Act issued a notice to conduct an enquiry. But that notice was defective and was cancelled. A second notice was issued dated 28 February 2001 fixing the inquiry on 15 March 2001. I But the inquiry was never held. That is because the respondent whose land the appellant required for purposes of the grid we spoke of a moment ago, moved to the High Court for judicial review to quash the s 11 notice dated

23 December 2000. The learned judge who heard the application under O 53 of the new Rules of the High Court 1980 ('the RHC') stayed the proceedings of the land administrator when granting leave to seek judicial review. Later, on the substantive application, the learned judge granted the relief sought and quashed the notice in question. His reasons are set out in extenso in his carefully reasoned judgment which is now reported in *Tekali Prospecting Sdn Bhd v Tenaga Nasional & Anor* [2002] 1 MLJ 113. They may be summarized briefly thus.

First, the s 11 notice suffered from an illegality because the purpose for which it was issued did not come within s 11(1) of the Act. Section 11(1) of the Act speaks of posts. What the appellant was seeking to construct were not mere posts but pylons. This did not therefore fall within the terms of s 11(1) of the Act. The notice was therefore a worthless piece of paper. Secondly, the availability of an appeal under the Act (to which we will refer in greater detail later in this judgment) did not preclude the court from granting judicial review. It was the duty of the court upon the first signs of an illegality to nip the impugned action in the bud: *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1. So much for a summary of the judge's principal reasons.

The appellant was dissatisfied with the decision of the High Court and has appealed to us. Its appeal, argued over two days, the day before yesterday and yesterday, is based on four main submissions. Encik SH Amirudin, counsel for the appellant who had developed a careful and well researched argument in support of his client's case, formulated his four submissions as follows.

First, the s 11(2) notice, read together with s 11(1) of the Act, reflects a mere intention on the part of the appellant to enter upon the respondent's land. The appellant can do nothing once the respondent objects because it has to await the decision of the land administrator under s 11(7) of the Act after he had held an enquiry under s 11(6) of the Act. Section 11(7) of the Act confers upon the land administrator fairly wide powers. He may either decide in favour of the respondent unconditionally; or he may uphold the notice in favour of the appellant either with or without imposing conditions. The respondent therefore ought to have waited for the outcome of the s 11(7) decision of the land administrator. If it was dissatisfied with his decision, it had another avenue open to it. It could appeal to the state authority. Its act of by-passing the statutory appeal procedure housed in the Act and approaching the court for judicial review was a premature action, for it truncated the appeal procedure prescribed by the Act. In any event, judicial review ought to be declined where an adequate alternative remedy is as here prescribed. The judge was therefore wrong in granting the relief.

Encik Amirudin's second submission really forms part of his first and flows from it. He says that since no decision has been made under s 11(7) of the Act, the respondent is not a person 'adversely affected' within O 53 r 2(4) of the RHC. Thirdly, the appellant being a public limited company is only amenable to private law remedies. Judicial review cannot therefore go to it.

Fourthly, in response to the learned judge's conclusion that the s 11 notice issued by his client was an illegality, En Amirudin argues that such is not the case. He says that the learned judge misconstrued the Act in particular s 11. Had he hearkened to the statutory language, he would not have come to the conclusion that the notice under s 11 was tainted with illegality.

Mr A Kanesalingam, counsel for the respondent seeks to support the learned judge's judgment. Arguing the respondent's case with his usual thoroughness, Mr Kanesalingam submits that the correct legislation to use in the circumstances of the present case is not the Act but the Land Acquisition Act 1960 ('the LAA'). This is not a case where a few posts are going to be erected. This is a case where huge pylons are going to rest on his client's land for a very long time; even forever. What his client is being deprived of is a strip made up of 7.064 acres. He says that to add insult to serious injury, his client is also not permitted to come anywhere near two chains on either side of the proposed pylon. In these circumstances, the Act provides little, if any, appropriate relief to his client. By contrast his client would not be as injured, as it presently is, if the strip of land spoken of a moment ago was compulsorily acquired by the state authority for the appellant. In that event, the respondent would be entitled to justly receive substantial compensation not available to it under the Act.

It is appropriate to add, in fairness to Mr Kanesalingam, that he did not, at our invitation, advance any argument in answer to En Amirudin's third submission, ie on the amenability of the appellant to judicial review.

In answer to the argument that there is an alternative remedy available under the Act, Mr Kanesalingam argues that on the facts of the present case that statutory remedy is inadequate. This is because the notice under s 11 is itself an illegality and issued without jurisdiction, and accordingly, the appeal procedure comes to nothing. Finally, in support of his other arguments, Mr Kanesalingam submits that the Act does not empower the appellant to set aside the strip of land to which we referred earlier. The entire exercise is therefore ultra vires the statute.

We now turn to address each of the issues raised by the joinder of submissions by counsel, but not necessarily in the order in which they have been presented to us.

We begin by considering what we will call 'the illegality point'. This turns on a construction of s 11(1) of the Act. The relevant words in that subsection for the purposes of the instant appeal are 'such posts and other equipment as may be necessary or proper for the purposes of the licensed installation'. Do these words confine the appellant as licensee under the Act to merely constructing posts? With respect, we do not think so. If one looks at the definition of the word 'equipment' appearing in the phrase quoted above, found in s 2 of the Act, this is what it says:

> 'equipment' includes any item for such purposes as generation, conversion, transmission, distribution or utilization of electrical energy, such as machines transformers, apparatus, measuring instruments, protective devices, wiring materials, accessories and appliances …

Particular emphasis is to be placed upon the word 'includes' in this definition. On settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression 'includes' to define some other word or expression, the intention is to leave the meaning of the expression defined open ended. By contrast, when the word 'means' is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined. The difference to which we have just adverted is plainly apparent when one compares the definition of 'equipment' with that of 'energy' and 'generating station' also appearing in s 2 of the Act. Both the latter expressions are immediately followed by the word 'means'. Mr Kanesalingam frankly concedes that the word 'includes' does leave the definition of the expression 'equipment' fairly open ended.

Now, in the definition of the word 'equipment' one must pay special attention to the phrase 'any item for such purposes as … transmission'. When Parliament uses technical words they must be given their technical meaning, see *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576, where the word 'committal' appearing in the Legal Profession Act 1976 was given its technical meaning.

So here, the expression 'such purposes as transmission' must a fortiori include pylons designed to carry electrical power from one point to another. It would be, with respect, ridiculous to suggest that Parliament went to all the trouble of enacting such a comprehensive piece of legislation such as the Act to confine licensees to erecting only posts to convey electricity. We, therefore, have no difficulty in rejecting the argument of counsel for the respondent advanced in the court below and accepted by the learned judge that s 11(1) of the Act is so restricted as to preclude the incorporation in it of the construction of transmission lines bearing pylons. It follows therefore that the s 11(2) notice in the present case is not tainted with any illegality. It is a perfectly valid document.

That brings us to the next point, which we will call 'the alternative remedy' argument. We find copious citation of authorities on this part of the case to be wholly unnecessary. In our view, the law is well settled. It has been settled by the judgment of that eminent judge, Hashim Yeop A Sani SCJ (as he then was) delivering the decision of the Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, where (at p 189) he said:

> In answer to the first question, we would therefore hold that the discretion is still with the courts, but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty, or in appropriate cases, a serious breach of the principles of natural justice.

We may add that 'lack of jurisdiction' now comes within the category of illegality formulated by Lord Diplock in his Delphic speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. And it is in that context that our Federal Court applied it in *Majlis Perbandaran Pulau Pinang*.

Having held that the s 11 notice is not tainted with illegality, we are unable to discern that the present case comes within any of the exceptions provided as guidelines by Hashim Yeop A Sani SCJ. So far as Mr Kanesalingam's other complaints are concerned, such as the inappropriateness of the compensation element and the inapplicability of the Act to the case where land has to be set aside, these are in our view, more appropriate for the hearing before the land administrator under s 11(6) of the Act. But we would add by way of caution that upon a careful scrutiny of the Act, we are not in agreement with Mr Kanesalingam's argument that the Act does not enable the setting aside of land. Pylons cannot be constructed in mid air. They have to rest on solid ground. It follows that some land has to be set aside for that purpose. The approach that has commended itself to us is purposive, and that is the correct approach in cases of modern statutory interpretation. Useful reference may be made to the speech of Lord Griffith in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, where he adverted to the predominance of the purposive approach to statutory interpretation and the abandonment of the literal approach.

So far as the complaints about compensation are concerned, these are, in our view, sufficiently addressed in s 16 of the Act:

> (1) The amount of compensation, if any, payable under ss 11 or 13 shall be assessed by the district land administrator after such enquiry as he shall deem sufficient. The assessment shall be substantially in the form set out in the Third Schedule.
>
> Provided further that no compensation shall be payable by the licensee in respect of any tree within fifty feet of the centre line of any road constructed or maintained by the state government or by any local authority unless it is proved that the tree was in existence prior to the construction of the road.
>
> (2) Any person aggrieved with the district land administrator's assessment may within twenty-one days after the assessment appeal to the state authority whose decision shall be final.

If the respondent has any complaints, then it is required to be addressed on an application for judicial review. And the proper time at which this should be done is after the exhaustion of the statutory appellate procedure. Further, we find the respondent's fear that it will not obtain fair and reasonable compensation under the Act as compared to the LAA to be more imagined than real. Section 11(1) of the Act makes it abundantly clear that 'full compensation in accordance with s 16' is to be paid 'to all persons interested for any disturbance, damage or disability' suffered by them. In our view, these are words of wide import. In our judgment, these are words which take their colour from the context of their use, that is to say, in the application of the Act to the peculiar facts of an individual case. It is a salutary guide to statutory interpretation that the meaning of words in a particular context must be ascertained by considering the subject matter and the nature of the context in which they are found (see, NS Bindra's *Interpretation of Statute* (8th Ed) at p 261). So, these words would, in appropriate circumstances, such as the present case, encompass the deprivation or loss of use of land in consequence of the erection of pylons.

In *Taylor & Anor v North West Water* (1995) 70 P & CR 94, the respondents (North West Water), after giving notice to the claimants under s 15 of the Public Health Act 1936, constructed a sewer through the claimants' land. This was treated as a compulsory acquisition of the stratum of subsoil comprising the sewer for which compensation was payable. A parallel may be drawn in respect of any loss of use of the land occasioned to the instant respondent. A B

In our view therefore, there is merit in En Amirudin's submissions on the points we have addressed thus far. We are therefore driven to the conclusion that the learned judge was wrong in issuing judicial review against the appellant and in quashing the s 11 notice.

That brings us now to the final point in the case. It is contained in En Amirudin's argument on which we did not invite any response. As we said earlier in this judgment, the appellant is a public company. It has shareholders among members of the public, for its shares are quoted in the Kuala Lumpur Stock Exchange. Nevertheless it has certain statutory powers such as those set out in ss 10 and 11 of the Act. When it issued the s 11 notice, it was exercising a statutory power as a licensee under the Act. So what answer is to be given to the question: does judicial review lie against the appellant? In our view, the answer lies in two words. It depends. C D

If the activity of the appellant in the private law sphere is called into question, eg the wrongful allotment or issuance of shares, the alleged wrongful removal of a director and the like, then, plainly judicial review will not lie. On the other hand, if the activity complained of falls within the public law environment, then of course judicial review will be available. Encik Amirudin valiantly sought to argue the unarguable by reference to passages in *De Smith, Woolf and Jowell on Judicial Review of Administrative Action* (5th Ed). Those passages refer to privatized bodies in England and we do not find them useful in the present context. Encik Amirudin also referred to another privatized agency, Telekom Malaysia Bhd, in order to show that judicial review ought not to lie in the present case. With respect, we are not in a position to test the accuracy of that argument for we do not have before us the relevant legislation governing that privatized agency. We are now only concerned with the appellant's position in public law. And of that, there is no doubt whatsoever in our minds. To agree with En Amirudin would be to place the appellant outside the purview of judicial review correction. That is hardly a desirable consequence. Whether any other privatized agency shall be subjected to judicial review would depend upon, as Mr Kanesalingam correctly submits, the terms of the particular statute. E F G H

A complete answer to En Amirudin's argument on this part of the case is to be found in the following passage in the judgment of Abdoolcader J (as he then was) in *OSK & Partners Sdn v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179 at p 186: I

> In the light of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the exchange is a hybrid corporation — a company incorporated under the Companies Act but

recognized and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of s 6(2)*(b)*(vi) and *(c)* which prescribe the public interest as the prime consideration. The exercise of disciplinary powers by the exchange is conferred and prescribed by legislation under which the minister is to approve the scope and type of such powers and the exercitation whereof would affect the livelihood of its members. Generally, statutes regulating the several professions provide for a body to be established to exercise disciplinary powers over its members but under the Act the method of discipline is effected by delegating that power to a body not established by the Act itself but which must be approved by the minister pursuant to and is controlled and subject to its provisions, and so it virtually comes to nothing.

We should perhaps add, anent the learned judge's assessment of its genre, that we cannot but express in the circumstances our view, pithily but perforce, that the exchange is no more an exclusive business club than the Criminal Injuries Compensation Board (in *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864 at p 882 which has been repeatedly applied since) can be said to be merely a welfare benefit society. The Board in that case contended that it had no real authority as its decisions only gave people a better but unenforceable chance of receiving charity from the crown, but the court said that this did not detract from its authority.

The committee which is responsible for the management of the affairs of the exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the adhibition of that power and it is therefore subject to judicial review by way of certiorari and prohibition.

In our judgment, the position of the appellant is not significantly different compared with that of the Kuala Lumpur Stock Exchange so as to exempt it from judicial review.

For the reasons already given, this appeal succeeds. We would accordingly allow the appeal, set aside the judgment and orders made by the High Court and dismiss the respondent's substantive motion on which the orders in question were made. We will now hear arguments on costs.

Before concluding, we must express our gratitude to counsel on both sides of the Bar without whose valuable assistance this ex-tempore judgment would not have been possible.

Appeal allowed.

Reported by Peter Ling